In the Supreme Court of the United States

OCTOBER TERM, 1921.

LAMBERT RUN COAL COMPANY, appellant, v. THE BALTIMORE & OHIO RAILROAD Company, appellee. } No. 153.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES AS AMICUS CURIÆ.[1]

[1] The United States appeared by its counsel as *amicus curiæ* before the Court of Appeals. (See Tr. 123; Appellant's brief, 16.)

STATEMENT.

The appeal is from the decree of the Circuit Court of Appeals (Tr. 131) which reversed the order of the District Court (Judge Dayton) and remanded the cause with directions to dismiss the bill (Tr. 131).

The order reversed granted a preliminary injunction against the Baltimore & Ohio Railroad which in effect prevented it from complying with an order of the Interstate Commerce Commission issued on April 15, 1920, modifying the rules governing the distribution of

coal cars. Although the provision under which the commission acted in issuing the order was paragraph (15) of section 1 of the interstate commerce act, the basis of the preliminary injunction was that the Company was not distributing its cars in accordance with paragraph (12) of section 1. The order is as follows (Tr. 105):

APRIL 15, 1920.

Notice to carriers and shippers:

The supply of cars available for the transportation of coal continues insufficient to meet the demand. In view of the cessation of Government control of coal production and distribution, effective April 1, 1920, and in order that railroad fuel requirements may be reasonably met without the necessity of carriers resorting to confiscation of commercial coal, it becomes necessary to amend our notice to carriers and shippers dated March 2, 1920, and our recommendation therein to read as follows:

"The commission recommends that until experience and careful study demonstrate that other rules will be more effective and beneficial, the uniform rules as contained in the Railroad Administration's Car Service Section Circular CS 31 (revised) be continued in effect, except that rule 8 as contained in said circular should be amended to read:

"'8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio. et al.* v. *H. V. Ry. Co.* (12 I. C. C., 398), and *Traer* v. *Chicago & Alton Railroad Co. et al.* (13 I. C. C. 451),

will be designated as "assigned" cars. All other cars will be designated as "unassigned" cars.'

"The commission is of opinion that an emergency exists requiring immediate action, and in exercise of the authority conferred by paragraph (15) of section 1 of the interstate commerce act, as amended by section 402 of the transportation act, 1920, hereby suspends the operation of the existing rule 8 and directs the observance by all carriers by railroad subject to the interstate commerce act of rule 8 modified as above, effective April 16, 1920, and until the further direction or order of the Commission."

The words "hereby suspends the operation of the existing rule and *directs* the observance by all carriers by railroad * * * of rule 8 modified as above * * * and until the further direction or order of the commission," clearly impresses the action of the commission with the status of an order.

Lambert Run Coal Company, appellant, filed a bill against the railroad company, appellee, in the Marion County Circuit Court, of West Virginia, (1) to enjoin the railroad company during the period of car shortage from observing or enforcing its car-service rules Nos. 8, 9, and 10, or any or either of said rules, or any other rules, regulations, or practices having like effect; and (2) to compel it to comply with the provisions of paragraph (12) of section 1 of the act to regulate commerce, as amended by the transportation act of 1920, and to maintain and

apply mine ratings, and to count each and every car furnished to or used by the mines for transportation of coal against the mine using it.

In drafting the bill the pleader refrained from making any reference whatever to the fact that the rules attacked were adopted by the railroad company in pursuance of the order of the Interstate Commerce Commission of April 15, 1920, and that the commission issued the order in pursuance of paragraph (15).

The railroad company removed the cause to the United States district court. It then answered the bill and set up the order of the commission and the adoption of its rules in pursuance thereof.

On the hearing of the motion of the coal company for preliminary injunction, the counsel for the railroad company objected to the jurisdiction of the district court over either the parties or subject-matter, assigning as the two main grounds that, (1) even in the absence of any action or order of the commission, application should first have been made to the commission for relief; (2) the commission having acted and its order having been pleaded, the parties and notices essential before its validity or invalidity and effect may be considered were absent, namely, the United States as defendant, separate notices to the Attorney General and the Interstate Commerce Commission, and three judges to sit, at least one of whom shall be a circuit judge. (38 Stat. 219, 220.)

The coal company prevailed against the objections which were overruled by the district judge, who

ordered the hearing to proceed before him alone. After hearing, the district court held in effect that the order of the commission was null and void, that the rules of the railroad company should go for naught, that the prayer of the bill should be granted, and that a preliminary injunction should issue. By a formal decree about which there can be no misapprehension whatever the order of the commission was rendered ineffective and for all practical purposes was set aside completely (Tr. 107, 108). The railroad company was directed "to comply with the provisions of paragraph (12) of section 1 of the interstate commerce act and, during any such period, to maintain and apply mine ratings to all of the mines served by the defendant and to count each and every car furnished to or used by the said mines for transportation of coal against the mine using it; * * *" (Tr. 109). The railroad company appealed and the Circuit Court of Appeals promptly stayed and suspended the injunction order (Tr. 122).

On final hearing the Court of Appeals in a unanimous opinion delivered by Circuit Judge Woods (267 Fed. Rep. 776) reversed the decree with directions that the injunction be dissolved and the bill dismissed (Tr. 124–131). From the final decree of the Circuit Court of Appeals the Coal Company has appealed to this court, and by its assignment of errors has challenged the correctness of the opinion and decree of the Circuit Court of Appeals.

THE PERTINENT PARAGRAPHS OF THE ACT.

The transportation act, 1920, provides (41 Stat. 456, 476):

> SEC. 402. The paragraphs added to section 1 of the interstate commerce act by the act entitled "An act to amend an act entitled 'An act to regulate commerce,' as amended, in respect to car service, and for other purposes," approved May 29, 1917, are hereby amended to read as follows:
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> (12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.
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> (15) Whenever the commission is of opinion that shortage of equipment, congestion of

traffic, or other emergency requiring immediate action exists in any section of the country, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine: (*a*) To suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission; (*b*) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; (*c*) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon, or in the event of their disagreement as the commission may after subsequent hearing find to be just and reasonable; and (*d*) to give

directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the commission shall, under the power herein conferred, direct that such preference or priority be afforded.

ARGUMENT.

I.

The Court of Appeals did not err in holding "that the making and promulgating of rule No. 8 as amended was clearly within the power of the commission" (Tr. 120).

In the brief filed in this court (pp. 62–106) the counsel for the appellant have presented an elaborate argument to the effect that the Circuit Court of Appeals erred in holding that paragraph (15) conferred power on the commission to relieve the carriers of the obligation imposed by paragraph (12), or to prescribe a different rule of car distribution. Moreover, it is argued (p. 82) that if paragraph (15) should be construed as conferring upon the commission authority to give directions as to the distribution of cars among shippers, such authority can not be held to extend to the giving of any directions inconsistent with the express statutory requirements of paragraph

(12). Again, it is argued (p. 97) that paragraph (15) should not be construed as conferring power on the commission to dispense with the car-shortage provisions of paragraph (12) or to establish another rule in its place, for the reason that if it is so construed it involves an invalid delegation of legislative power.

The bill was based on paragraph (12) and the order granting the preliminary injunction refers to that paragraph. The commission based its order on paragraph (15) and the Court of Appeals sustained its authority under that paragraph.

While the two paragraphs may be made effective under different circumstances and conditions they are reciprocal and the one counterbalances the other. Paragraph (12) may well apply to ordinary car shortages which more nearly affect the output of the mines disconnected from the shortage of fuel or public emergency for lack of fuel. Paragraph (15) applies "whenever the commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country." For ordinary car shortages due to excessive sales or shipments, or other causes, the commission turns to and is controlled by paragraph (12), but when emergency requiring immediate action exists, such as the public safety or welfare, the commission turns to and is controlled by paragraph (15). There is no ambiguity or inconsistency in the two paragraphs. Each stands on its own foundation. Each is a limitation on the other and the com-

mission is designated as the authority to make the one effective against the other.

The mandate of the statute is that "*whenever the commission is of opinion* that shortage of equipment, * * * or other emergency requiring immediate action exists in any section of the country, the commission shall have, and it is hereby given, authority," etc. Thus, in the commission is reposed the sole authority to declare that emergency requiring immediate action exists. It is not to be presumed that the commission will declare that emergency requiring immediate action exists when no such emergency in fact does exist. On the other hand, it may fairly be presumed that if such emergency does exist the commission will not shrink from its duty but will so declare; and that in so declaring the commission will exercise its power providently.

Suffice it to say that for the instant case the commission, by its notice of April 15, 1920, declared that it was of opinion that an emergency exists requiring immediate action and directed the observance by all carriers of rule 8 modified as above.

The form of the legislation is fundamental and is as old as the Government. All of the great statutes for the prosecution of the war were enacted in pursuance of the legislative principle of the flexibility of statutes to meet emergency conditions as they arise, i. e., the national-defense act, the shipping board act, the naval emergency-fund act, the food and fuel control act, and the later and equally important, the transportation act of 1920.

As observed by Circuit Judge Woods in his opinion, the coal company is claiming the benefits of a statute and at the same time asserting the unconstitutionality of its limitations, citing *Daniels* v. *Tearny* (102 U. S. 415); *Grand Rapids & Indiana Railway Co.* v. *Osborne* (193 U. S. 17 (Tr. 130)).

The power of the commission to prescribe rules and regulations for the pro rata distribution of cars to mines for the receipt and transportation of coal was first sustained by the commission itself, *Railroad Commission* v. *Hocking Valley Ry. Co.* (12 I. C. C. 398) and *Traer* v. *Chicago & Alton* (13 I. C. C. 451); and then by this court in *Interstate Commerce Commission* v. *Illinois Central* (215 U. S. 452); *Same* v. *Chicago & Alton* (215 U. S. 479); and *Baltimore & Ohio* v. *Pitcairn Coal Co.* (215 U. S. 481). The rules and regulations announced by the commission in those cases and sustained by this court were finally enacted into statute by paragraph (12) and they have no relation to emergency requiring immediate action.

If the action of the commission is not an order within the meaning of the Commerce Court act (36 Stat. 539) and urgent deficiencies act (38 Stat. 219), then the position of appellant becomes even more difficult, as under the same authorities the appellant should have applied to the Interstate Commerce Commission for a hearing; otherwise uniformity of regulation fails and chaotic conditions result. The district judge specifically limited the effect of the injunction order to "within the jurisdiction of this court" (Tr. 108). Thus, a rule is applied to the Northern

District of West Virginia which does not apply to other districts; moreover, the rule is applied only to a section of a single railroad system. If the courts take jurisdiction in the first instance, other judges in other districts may take different views and enter conflicting orders with the result that the whole purpose of the interstate commerce acts establishing uniformity of regulation, and of the foregoing acts to bring about one judicial review, may be wholly defeated.

It will be observed that in addition to clause (*a*) the powers conferred with respect to clauses (*b*), (*c*), and (*d*) of paragraph (15) are of tremendous import. While not directly involved in the instant appeal, any decision construing paragraph (15) and clause (*a*) thereunder will necessarily have a substantial bearing on the powers of the commission to execute clauses (*b*), (*c*), and (*d*), as all clauses are embraced within the powers conferred by the opening sentence of the paragraph. Ultimately cases may arise in which the railroad companies themselves may attack the validity of clauses (*b*), (*c*), and (*d*) and the powers of the commission thereunder.

II.

The single-handed district judge was without power to enter the decree which in effect enjoined the Baltimore & Ohio from complying with an outstanding unchallenged order of the commission.

In its answer filed in the District Court the Baltimore & Ohio set up the order of the commission and its endeavor in good faith to comply therewith.

In its opinion the court of appeals said (Tr. 130):

> Even if the District Court had been right in refusing the motion to dismiss the bill the order of injunction could not stand, because the execution of the order of the Interstate Commerce Commission could be enjoined only by three judges, one of them being a circuit judge, after notice to the commission and to the Attorney General. Act October 22, 1913, Compiled Statutes, section 998.

With that order of the commission before it, the District Court issued a drastic and sweeping injunction which made it impossible for the Baltimore & Ohio to comply with the commission's order. Passing the question whether the coal company had any standing whatever to file the bill of compliant without first applying to the commission for relief, *Proctor Gamble Co.* v. *United States*, 225 U. S. 282, and cases cited above, the relief prayed and granted rendered ineffective an unchallenged order of the commission with which the company had undertaken to comply. In effect the decree enjoined the force and effect of an order of the commission, as unquestionably the Baltimore & Ohio could not comply with the order of the commission and paragraph (12) at one and the same time.

In *State of North Dakota* v. *Chicago & North Western Ry. Co.* (25 Original), decided January 23, 1922, the bill was filed "against certain named railroad companies to prevent their applying an order of the Interstate Commerce Commission until this court can review the decision upon which that order

was made." In considering the argument that the suit was one to set aside or suspend an order of the commission, this court, speaking through Mr. Justice Holmes, said:

> For although it is argued that the requirement that the United States should be made a party is a mere matter of procedure for the purpose of giving the Department of Justice control, we can not limit the significance of the Judicial Code (sec. 211) by such a speculation. The language of the section shows that public interests were before the mind of Congress, and that in its opinion an order made in the public interest should not be hindered from going into effect until the representatives of the public had been heard. It appears to us that this view is so reasonable that it should be accepted by this court even if not bound.

In *Illinois Central* v. *State Public Utilities Commission* (245 U. S. 493) the carriers filed bills against the Utilities Commission to enjoin the latter from interfering with the carriers in their compliance with an order of the Interstate Commerce Commission. The Utilities Commission filed cross bills which assailed the validity of the Interstate Commerce Commission's order on various grounds and concluded with a prayer that it be set aside and annulled. In holding that the cross bills should be dismissed, this court said:

> Passing the fact that they were presented as *cross* bills, it is apparent that in subject matter and purpose they were suits to set aside the order.

III.

The Court of Appeals had the authority to reverse the order granting the preliminary injunction and to remand the cause with directions that the bill should be dismissed.

The District Court was clearly without jurisdiction to entertain the bill. The coal company objected to the only amendment possible to be made and its counsel were insistent on standing on the case as they first made it.

The Court of Appeals had ample authority, sua sponte, to reverse the judgment with directions to the District Court to dissolve the preliminary injunction and to dismiss the bill. *Smith* v. *Vulcan Iron Works* (165 U. S. 518); *Mast. Foos & Co.* v. *Stover Mfg. Co.* (177 U. S. 485, 494).

That course has been followed in cases challenging unsuccessfully the validity of orders of the commission. *I. C. C.* v. *B. & O. R. R. Co.* (225 U. S. 326, 346); *Los Angeles Switching case* (234 U. S. 294).

The decree should be affirmed.

JAMES M. BECK,
Solicitor General.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

MARCH 4, 1922.

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party. Act of October 22, 1913, c. 32, 38 Stat. 208, 220; Jud. Code, §§ 208, 211. P. 381.

2. Jurisdiction of a suit to restrain a railroad company from following rules for car distribution prescribed by the Commission can not be acquired by a state court, or by the District Court upon removal therefrom, through the plaintiff's concealment of the fact that the rules were so prescribed. P. 382. *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479, distinguished.

267 Fed. 776, modified and affirmed.

APPEAL from a decree of the Circuit Court of Appeals reversing an order of the District Court, which granted an interlocutory injunction, and directing that the injunction be dissolved and the bill dismissed for want of jurisdiction, in a suit by the appellant to restrain the appellee from following certain rules of car distribution, and to require it to furnish cars upon another basis.

Mr. Frank E. Harkness and *Mr. Rush C. Butler*, with whom *Mr. Ernest S. Ballard* and *Mr. Herbert Pope* were on the briefs, for appellant.

Mr. A. G. Gutheim and *Mr. R. V. Fletcher*, with whom *Mr. Hugh L. Bond, Jr.*, and *Mr. W. S. Bronson* were on the brief, for appellee.

Mr. Solicitor General Beck and *Mr. Blackburn Esterline*, Special Assistant to the Attorney General, by leave of court, filed a brief on behalf of the United States, as *amici curiae*.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

The distribution of coal cars in times of car shortage has been a fertile field of controversy. The subject has received much attention from Congress, the Interstate Commerce Commission and the courts. Definite rules for distribution were promulgated by the Commission; and they remained in force for many years. Among these

was the so-called assigned car rule declared by the Commission in *Railroad Commission of Ohio* v. *Hocking Valley Ry. Co.*, 12 I. C. C. 398, and *Traer* v. *Chicago & Alton R. R. Co.*, 13 I. C. C. 451, and sustained by this court in *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452.[1] As an incident of the war this rule was modified by the Railroad Administration acting in conjunction with the Fuel Administration; and the assignment of cars for railroad fuel was abandoned. When by the Transportation Act, 1920, provision was made for restoring the railroads to private control, § 1 of the Act to Regulate Commerce was amended, among other things, by inserting a paragraph numbered 12, which deals specifically with the distribution of coal cars. Act of February 28, 1920, c. 91, § 402, 41 Stat. 456, 476.

In June, 1920, the Lambert Run Coal Company, a West Virginia corporation, which owns and operates a mine in that State, brought, in the Circuit Court of Marion County, this suit against the Baltimore & Ohio Railroad Company, a Maryland corporation. The bill alleged that there was an acute car shortage; that the railroad had refused to make the distribution required by paragraph 12 of § 1 of the Act to Regulate Commerce and in violation thereof distributed cars in accordance with its own rules 8, 9 and 10, set out in the margin,[2] and that this course was resulting in irreparable injury to plaintiff. The bill

[1] See also *Rail & River Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 14 I. C. C. 86; *Hillsdale Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 19 I. C. C. 356; *In re Irregularities in Mine Ratings*, 25 I. C. C. 286; *Coal and Oil Investigation*, 31 I. C. C. 193, 217; *In re Assignment of Freight Cars*, 57 I. C. C. 760; *Southern Appalachian Coal Operators' Association* v. *Louisville & Nashville R. R. Co.*, 58 I. C. C. 348; *Corona Coal Co.* v. *Southern Ry. Co.*, 266 Fed. 726.

[2] "8. Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *Railroad Commission of Ohio et al.* v. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co. et al.*, 13 I. C. C.

prayed that the railroad be restrained from observing these rules and that it be required to furnish cars in accordance with the established ratings.

The defendant removed the case to the federal court for the Northern District of West Virginia and there filed in a single pleading a motion to dismiss and an answer. As grounds for the motion it alleged that the case was not one within the jurisdiction of the state court; that, since it did not appear that the Commission had taken any action in respect to the matter complained of, neither court had jurisdiction of the controversy; that the plaintiff had concealed the fact that the rules of the carrier complained of were, as plaintiff knew, rules which had been promulgated by the Commission; that the bill was thus one to restrain enforcement of an order of the Commission; and that the United States and the Commission were indispensable parties. The answer set forth the facts supporting these allegations and, among other things, that the rules promulgated by the Commission and adopted by the carrier had been issued on April 15, 1920, in pursuance of the emergency provision known as paragraph 15, inserted in § 1 of the Act to Regulate Commerce by the Transportation Act, 1920, *supra*, 41 Stat. 456, 476.

Plaintiff then moved in the District Court for an interlocutory injunction. The defendant, insisting that the

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451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars.

"9. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars. The assigned cars, together with the mine's requirements, will be eliminated, and the remainder of the available car supply pro rated to the other mines, based on a revised percentage by reason of such elimination.

"10. If the number of assigned cars placed at a mine during any period, as provided in Rule 6, is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share."

proceeding was one to stay an order of the Commission, objected to a consideration of the motion in the absence of two other judges as provided by Act of October 22, 1913, c. 32, 38 Stat. 208, 220. Both this objection and the motion to dismiss were overruled by the District Judge; and an interlocutory injunction in accordance with the prayer of the bill was issued. From this order defendant appealed to the Circuit Court of Appeals for the Fourth Circuit. That court stayed the injunction pending the determination of the appeal; and later reversed the decree below with directions to dissolve the injunction and dismiss the bill. 267 Fed. 776. The reasons given by the Circuit Court of Appeals for its decision are, in substance, that the car distribution rule complained of appeared on uncontroverted facts to be that prescribed by the order of the Commission issued April 15, 1920; that this order was issued under paragraph 15 of § 1 of the Act to Regulate Commerce; that it was within the emergency powers there conferred; that the rights and duties prescribed by paragraph 12 of that section were not absolute, but were subject to suspension or modification by the Commission in case of emergency, as provided in paragraph 15; and that, therefore, the bill should have been dismissed. It added that the District Court erred in issuing the injunction for the further reason that, since the relief sought was to enjoin an order of the Commission, it could be granted only by a court of three judges.

The decree of the District Court was properly reversed; but we are of opinion that the Circuit Court of Appeals had no occasion to pass upon the merits of the controversy and that the direction should have been to dismiss the bill for want of jurisdiction and without prejudice. The rule of the railroad here complained of was that prescribed by the Commission. To that rule the railroad was bound to conform unless relieved by the Commission or enjoined from complying with it by decree of a court having jurisdiction. By this suit such a decree was in effect

sought. The appellate court was therefore correct in holding that in such a suit an injunction of the District Court could be granted only by three judges.

But there are in addition two fundamental objections to the jurisdiction. First, the United States, an indispensable party to suits to restrain or set aside orders of the Commission, was not joined, and could not be, for it has not consented to be sued in state courts. Secondly, such suits are required to be brought in a federal District Court. Judicial Code, §§ 208, 211; Act of October 22, 1913, c. 32, 38 Stat. 208, 219. *Illinois Central R. R. Co.* v. *State Public Utilities Commission*, 245 U. S. 493, 504; *North Dakota* v. *Chicago & Northwestern Ry. Co.*, 257 U. S. 485; *Texas* v. *Interstate Commerce Commission, ante*, 158. The fact that this was a suit to set aside an order of the Commission did not appear on the face of the bill; but it became apparent as soon as the motion to dismiss was filed. Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist. As the state court was without jurisdiction over either the subject-matter or the United States, the District Court could not acquire jurisdiction over them by the removal. The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction. *Courtney* v. *Pradt*, 196 U. S. 89, 92; *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257, 258.[1] To the situation here presented,

[1] See also *Fidelity Trust Co.* v. *Gill Car Co.*, 25 Fed. 737, 738–740; *Swift* v. *Philadelphia, &c. R. R. Co.*, 58 Fed. 858, 861; *Summers* v. *White*, 71 Fed. 106, 109; *Auracher* v. *Omaha & St. L. R. R. Co.*, 102 Fed. 1, 2; *Crowley* v. *Southern Ry. Co.*, 139 Fed. 851; *Zikos* v. *Oregon R. R. & Nav. Co.*, 179 Fed. 893, 899; *R. J. Darnell, Inc.* v. *Illinois Central R. R. Co.*, 190 Fed. 656, 658; *Philadelphia & Reading Ry. Co.* v. *Sherman*, 230 Fed. 814.

cases like *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479, relied upon by appellant, have no application. For, while it is true that a plaintiff by his first pleading determines what right he will sue on and that the defenses, set up either anticipatorily by him or in due course by the defendant, can not affect the jurisdiction when it depends on that right, yet the plaintiff may not, by alleging a frivolous claim or a fictitious situation, confer upon a court jurisdiction which, as determined by the plaintiff's real cause of action, it has not. *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25. And the vital interest of the United States was one which the plaintiff could neither ignore nor prejudice by indirection. Compare *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Goldberg* v. *Daniels*, 231 U. S. 218; *Louisiana* v. *McAdoo*, 234 U. S. 627. The District Court should therefore have dismissed the bill as soon as it became apparent that the suit was one to set aside an order of the Commission. *Robinson* v. *Anderson*, 121 U. S. 522; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.*, 185 U. S. 282, 287; *Devine* v. *Los Angeles*, 202 U. S. 313, 338. And the Circuit Court of Appeals in remanding the cause to the District Court should have directed a dismissal for want of jurisdiction and without prejudice.

Decree modified and affirmed.

MR. JUSTICE CLARKE took no part in the decision of this case.